Office Supreme Court, U.S.
FILED
JUN 12 1985
ALEXANDER L. STEVAS,
CLERK

(6)

No. 84-1698

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

RANSOM THEODORE SPURLOCK, *et al.*,
Petitioners,
v.
SANTA FE PACIFIC RAILROAD COMPANY AND KERR-McGEE CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Arizona

---

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION

BRENT N. RUSHFORTH *
JUDITH A. MATHER
DOW, LOHNES & ALBERTSON
1255 23rd Street, N.W.
Washington, D.C. 20037
(202) 857-2714

JACK E. EVANS
JACK E. EVANS, LTD.
73 North Country Club Drive
Phoenix, Arizona 85014
(602) 266-5752

Counsel for Petitioners

* Counsel of Record

June 12, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

10 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
I. The Claim that the Mineral Reservation Clause Is Void and Unenforceable, Affecting Millions of Acres in the West, Is Plainly Substantial and Warrants Review	1
II. The Decision of the Appellate Court, Conflicting with Decisions of this Court, Must Be Corrected	5
III. The Presiding Judge's Failure to Recuse Himself Should Be Considered by this Court	6
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:

Deseret Salt Co. v. Tarpey, 142 U.S. 241 (1891)	4
Howard v. Perrin, 200 U.S. 71 (1906)	4
Platt v. Union Pacific R. Co., 99 U.S. 48 (1879)	4
SCA Services v. Morgan, 557 F.2d 110 (7th Cir. 1977)	6
Spires v. Hearst Corp., 420 F.Supp. 304 (C.D. Cal. 1976)	6
Toltec Ranch Co. v. Cook, 191 U.S. 532 (1903)	4
Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983)	5
Wm. Cramp & Sons v. International Curtis Marine Turbine Co., 228 U.S. 645 (1913)	6

Miscellaneous:

Rule 45, Rules of the Supreme Court of Arizona, Canon 3C (Code of Judicial Conduct) (1976)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1698

RANSOM THEODORE SPURLOCK, *et al.*,
Petitioners,

v.

SANTA FE PACIFIC RAILROAD COMPANY AND KERR-MCGEE CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Arizona

---

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION

I. The Claim that the Mineral Reservation Clause Is Void and Unenforceable, Affecting Millions of Acres in the West, Is Plainly Substantial and Warrants Review.

This Court's determination whether a mineral reservation clause in deeds executed by Santa Fe Pacific Railroad Company ("Santa Fe") is void and unenforceable will affect the rights of more than 100,000 owners of over 4,000,000 acres in Arizona and New Mexico. Respondents do not challenge this fact and make not the slightest attempt to reconcile it with their assertion that this case presents "no . . . questions of any public importance." Brief in Opposition (hereinafter "Br. Opp.") at 4. To the contrary, this Court has consistently viewed

as significant just such issues as are posed here involving railroad land grant policies and preservation of a federal statutory framework which continues to affect the use of millions of acres rich in natural resources.

Respondents urge this Court not to correct the mistakes of the appellate court because, according to their theory, righting the wrong will have no effect on the rights of the Spurlocks. Respondents posit two alternatives if the reservation is void, both of which place title to the disputed substances in the Atchison, Topeka and Santa Fe Railway Company ("AT&SF").[1] Br. Opp. at 6-7. This ill-conceived stratagem cannot succeed in shifting the focus from the actual controversy here. This case does not present a controversy between the Spurlocks and AT&SF and no court has decided any question of quieting title as between the Spurlocks and AT&SF. Thus, if the court of appeals' decision is overturned, as it should be, the correct outcome is obvious—the trial court's determination that the reservation is void and unenforceable against the Spurlocks will be reinstated and title to the disputed substances as between Santa Fe and the Spurlocks will be quieted in favor of the Spurlocks. If, as a result of this outcome, AT&SF believes that a question exists as to title between itself and the Spurlocks, it is free to test in the state courts in the first instance any right it believes it may have.[2]

---

[1] Respondents argue that under either alternative the judgment of the appellate court is correct. Br. Opp. at 7-8. Even a cursory review of the court of appeals' decision demonstrates that respondents are wrong. Finding the reservation enforceable, the court of appeals directed judgment to be entered placing title to all but the surface of the lands, not in AT&SF, but in Santa Fe.

[2] While a potential controversy between the Spurlocks and AT&SF might conceivably raise issues concerning adverse possession by the Spurlocks as against asserted title by AT&SF, such hypothetical issues are not before this Court in this case. Thus, respondents' cursory discussion (Br. Opp. at 7 n.1) of a potential legal position on adverse possession that AT&SF might take at some future time

Respondents also unsuccessfully attempt to deflect attention from the importance of the issue by asserting that this Court should not resolve the question whether the mineral reservation is void and unenforceable because it might then be difficult and time consuming to confirm the owners' rights with respect to the 4,000,000 acres. Br. Opp. at 8-9. This, however, is no reason for leaving in place an appellate decision which negates the effect and intent of a congressional statutory scheme and which without doubt will have adverse precedential effect in resolving questions concerning title to this acreage.[3]

More importantly, by holding that the mineral reservation is void, this Court will effectively quiet title as between Santa Fe and the owners of the more than 4,000,000 acres. On the other hand, if the court of appeals' decision upholding the mineral reservation is allowed to remain, it will give rise to an untold number of additional lawsuits, especially in view of the "repurchase option" contained in the reservation. The reservation, as upheld by the court of appeals, in effect provides Santa Fe with the option of reacquiring the land for approximately one dollar per acre (the approximate average price per acre originally paid to Santa Fe) if the surface thereof is "necessary and convenient" for use in developing or acquiring any valuable substances on or under the land, currently known or discovered in the future. *See* App.

---

is wholly irrelevant to the determination here. Moreover, the appellate court's prior discussion of adverse possession does not affect the outcome, limited as it was to a question of adverse possession in the face of a valid mineral reservation in favor of Santa Fe which severed the surface estate from the mineral estate.

[3] Resolution of this issue will not be the source of controversies; controversies over this land currently exist. As set forth in the Petition, a controversy has existed between Santa Fe and the National Park Service since the late 1970s. Petition at 10 n.14. And this controversy is directly related to the enforceability of the reservation.

A at 29a-30a. Obviously, such an ever-present potentiality impairs the owners' ability to preserve or develop the land and has a severe negative impact on the economic value of the entire 4,000,000 acres.

What remains of respondents' opposition to the first question presented for review is directed to the merits of the issue and presents respondents' sole counter contention that Santa Fe had an unrestricted right to dispose of the grant lands. Full briefing of the question before this Court will, without doubt, demonstrate the blatant deficiencies in respondents' argument.[4] More importantly, respondents' argument serves to highlight the significance of the question presented—whether Santa Fe's scheme to sever and retain the grant lands achieved just the result Congress sought to avoid by an express statutory framework designed to keep the lands with and in aid of the railroad. Such an issue, affecting millions of acres with discovered and yet to be discovered valuable resources, is worthy of this Court's review.

---

[4] Indeed, in the very case relied upon by respondents (Br. Opp. at 14), *Platt v. Union Pacific R. Co.*, 99 U.S. 48 (1879), this Court unequivocally recognized the restrictions on disposition of railroad grant lands set forth in the Petition (99 U.S. at 63) and cautioned against dispositions of grant lands "manifestly made to evade . . . the [congressional] purposes for which the grants were made" (99 U.S. at 64), as was Santa Fe's scheme to retain the lands when transferring the railroad to AT&SF.

Moreover, contrary to respondents' argument (Br. Opp. at 11-12), the Spurlocks are not lodging an impermissible collateral attack on Santa Fe's patents. The Spurlocks challenge the mineral reservation on the ground that Santa Fe's title to the grant lands passed to AT&SF in 1903 by operation of law. The patents did not convey title to Santa Fe, which subsequently passed to AT&SF. Rather, title to the grant lands originally vested upon completion of the railroad. *Howard v. Perrin*, 200 U.S. 71, 74-75 (1906); *Toltec Ranch Co. v. Cook*, 191 U.S. 532 (1903). Patents also do not affect title which has already vested in another entity prior to their issuance, as is the case here where title vested in AT&SF. *Deseret Salt Co. v. Tarpey*, 142 U.S. 241, 248, 251 (1891).

II. The Decision of the Appellate Court, Conflicting with Decisions of this Court, Must Be Corrected.

Respondents argue that the Spurlocks' second ground for granting a writ of certiorari in this case, *i.e.*, the appellate decision conflicts with decisions of this Court, cannot be considered by this Court because it was not raised below. The second ground, by its very nature, is not subject to respondents' attack. The Spurlocks maintain that the court of appeals' decision finding the term "minerals" unambiguous, relying as it does on *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), is contrary not only to that decision, but to several other decisions of this Court. *See* Petition at 24. A Petition for Review of the court of appeals' decision was timely filed with the Arizona Supreme Court, but review was denied. Thus, it is now appropriate for this Court to review the appellate decision and determine if the result reached there conflicts with the decisions of this Court.

Recognizing the inherent conflict between the decision of the court of appeals in this case and the decisions of this Court, respondents also argue that the decisions of this Court should not apply because they involve congressional legislation granting lands and land rights. But the lands at issue here also were granted pursuant to an act of Congress, the 1866 Act, and were the subject of succeeding legislation in 1897 and 1902. Moreover, as fully set forth in the Petition at 16, a grant of land by Congress is a contract regarding the conveyance of land. In interpreting contracts of that nature, this Court has: (1) found the term "minerals" to be *per se* ambiguous, and (2) examined the intent of Congress as party to and maker of the contract. In this regard, there is no difference between the conveyance of land by Congress at issue in *Watt* and the conveyance by Santa Fe of the land granted by Congress—matters outside the contract, including the intent of the parties, must be examined to resolve the inherent ambiguity in the term "minerals." The

court of appeals' decision, refusing to permit this mandated examination, is thus fundamentally unsound and must be corrected.

III. The Presiding Judge's Failure to Recuse Himself Should Be Considered by this Court.

Respondents argue that review of the recusal question is inappropriate because the Spurlocks did not demand the presiding judge's recusal. In particular, respondents assert that certain statements in letters to Judge Haire from counsel for the Spurlocks demonstrate that a recusal request was not made. Counsel's letters, however, unambigously state that a recusal question existed because of material knowledge possessed by Judge Haire [5] and that it was the court's duty to consider that question. Moreover, Canon 3C of the Arizona Code of Judicial Conduct relieves the party of the need to demand recusal and places a positive duty on the court to undertake determination of the question whenever the circumstances, regardless of how they are brought to the attention of the court, raise the question.

Contrary to respondents' argument, the positive mandate that recusal occur where a judge's impartiality might reasonably be questioned because he has personal knowledge of disputed evidentiary facts cannot be waived and permitting objections of untimeliness or failure to raise the issue, as respondents attempt here, would defeat the purpose of the Canon. *See Wm. Cramp & Sons v. International Curtis Marine Turbine Co.*, 228 U.S. 645, 650 (1913). *See also, SCA Services v. Morgan*, 557 F.2d 110 (7th Cir. 1977); *Spires v. Hearst Corp.*, 420 F.Supp. 304 (C.D. Cal. 1976). Thus, the overriding consideration of preventing even the appearance of impartiality on

---

[5] Contrary to respondents' assertion of "minimal evidentiary value" (Br. Opp. at 22), as demonstrated in the Petition at 27-28, the facts possessed by Judge Haire were material to one of the core issues in the case, *i.e.*, the meaning of the mineral reservation.

the part of a judge must prevail and dictates review of the question of violation of the Spurlocks' fundamental right to due process by Judge Haire's failure to recuse himself.

CONCLUSION

For the reasons set forth in the Petition and herein, a writ of certiorari should be granted to review the decision of the Court of Appeals of the State of Arizona.

Respectfully submitted,

BRENT N. RUSHFORTH *
JUDITH A. MATHER
DOW, LOHNES & ALBERTSON
1255 23rd Street, N.W.
Washington, D.C. 20037
(202) 857-2714

JACK E. EVANS
JACK E. EVANS, LTD.
73 North Country Club Drive
Phoenix, Arizona 85014
(602) 266-5752

Counsel for Petitioners

* Counsel of Record

June 12, 1985